

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION : *Case No. 1:17-md-2804*
OPIATE LITIGATION : *Cleveland, Ohio*

THIS DOCUMENT RELATES TO: : *Thursday,*
: *September 24, 2020*
Track One-B Cases/Track Three : *2:55 p.m.*
Cases :

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TRANSCRIPT OF TELEPHONIC
JOINT STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE
- AND -
BEFORE THE HONORABLE DAVID A. RUIZ
UNITED STATES MAGISTRATE JUDGE

SPECIAL MASTER: DAVID R. COHEN

Court Reporter: Donnalee Cotone, RMR, CRR, CRC
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
donnalee_cotone@ohnd.uscourts.gov

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1 APPEARANCES (ALL PARTICIPANTS APPEARING TELEPHONICALLY):

2
3 On behalf of Plaintiffs:

4 **PETER H. WEINBERGER, ESQ.**

5 Spangenberg, Shibley & Liber
6 1001 Lakeside Avenue, Suite 1700
7 1900 East Ninth Street
8 Cleveland, Ohio 44114
9 216-696-3232
10 pweinberger@spanglaw.com

11 **SALVATORE C. BADALA, ESQ.**

12 **HUNTER J. SHKOLNIK, ESQ.**

13 400 Broadhollow Road, Suite 305
14 Melville, New York 11747
15 212-397-1000
16 sbadala@napolilaw.com
17 hunter@napolilaw.com

18 **DONALD MIGLIORI, ESQ.**

19 **LINDA SINGER, ESQ.**

20 **JOSEPH F. RICE, ESQ.**

21 Motley Rice LLC
22 28 Bridgeside Boulevard
23 Mount Pleasant, South Carolina 29465
24 843-216-9140
25 dmigliori@motleyrice.com
lsinger@motleyrice.com
jrice@motleyrice.com

PAUL J. HANLY, JR., ESQ.

Simmons Hanly Conroy LLC
112 Madison Avenue
New York, New York 10016
212-784-6400
phanly@simmonsfirm.com

1 APPEARANCES (*ALL PARTICIPANTS APPEARING TELEPHONICALLY*):

2
3 On behalf of Plaintiffs:

4 **STEVEN SKIKOS, ESQ.**

5 Skikos, Crawford, Skikos & Joseph, LLP
6 One Sansome Street, Suite 2830
7 San Francisco, California 94104,
(415) 546-7300
sskikos@skikos.com

8 **TROY RAFFERTY, ESQ.**

9 Levin, Papantonio, Thomas, Mitchell, Rafferty &
10 Proctor, P.A.
11 316 South Baylen Street, Suite 600
Pensacola, Florida 32502
850-435-7500
trafferty@levinlaw.com

1 APPEARANCES (ALL PARTICIPANTS APPEARING TELEPHONICALLY):

2
3 On behalf of Defendants Walgreen Co. and Walgreen
4 Eastern Co.:

5 **KASPAR J. STOFFELMAYR, ESQ.**

6 Bartlit Beck LLP
7 54 West Hubbard Street, Suite 300
8 Chicago, Illinois 60654
9 312-494-4400
10 kaspar.stoffelmayr@bartlitbeck.com

11 On behalf of Defendants CVS Pharmacy, Inc. and Ohio
12 CVS, L.L.C. ("CVS"):

13 **ERIC R. DELINSKY, ESQ.**

14 **SASHA MILLER, ESQ.**

15 **GRAEME W. BUSH, ESQ.**

16 Zuckerman Spaeder
17 1800 M Street, NW
18 Washington, DC 20036
19 202-778-1831
20 edelinsky@zuckerman.com
21 smiller@zuckerman.com
22 gbush@zuckerman.com

23 On behalf of Defendants HBC Service Company, an
24 unincorporated operating division of Giant Eagle,
25 Inc. ("HBC/Giant Eagle"):

26 **ROBERT M. BARNES, ESQ.**

27 **JOSH A. KOBRIN, ESQ.**

28 **SCOTT D. LIVINGSTON, ESQ.**

29 Marcus & Shapira
30 35th Floor
31 One Oxford Centre
32 301 Grant Street
33 Pittsburgh, PA 15219
34 412-471-3490
35 rbarnes@marcus-shapira.com
36 kobrin@marcus-shapira.com
37 livingston@marcus-shapira.com

1 APPEARANCES (ALL PARTICIPANTS APPEARING TELEPHONICALLY):

2
3 On behalf of Defendant Discount Drug Mart, Inc.:

4 **TIMOTHY D. JOHNSON, ESQ.**

5 Cavitch Familo & Durkin

6 20th Floor

7 1300 East Ninth Street

8 Cleveland, OH 44114

9 216-621-7860

10 tjohnson@cavitch.com

11
12 On behalf of Defendants Rite Aid of Maryland, Inc.
13 d/b/a Mid-Atlantic Customer Support Center, Rite Aid
14 of Ohio, Inc. and Rite Aid Hdqtrs. Corp. ("Rite Aid"):

15 **KELLY A. MOORE ESQ.**

16 Morgan, Lewis & Bockius

17 101 Park Avenue

18 New York, NY 10178

19 212-309-6612

20 kelly.moore@morganlewis.com

21 - and -

22 **JOHN P. LAVELLE, JR., ESQ.**

23 Morgan, Lewis & Bockius LLP

24 1701 Market St.

25 Philadelphia, PA 19103-2921

215-963-5000

john.lavelle@morganlewis.com

- and -

GREGORY T. FOUTS, ESQ.

Morgan, Lewis & Bockius LLP

77 West Wacker Dr.

Chicago, IL 60601-5094

312-324- 1776

gregory.fouts@morganlewis.com

1 APPEARANCES (*ALL PARTICIPANTS APPEARING TELEPHONICALLY*) :

2
3 On behalf of Defendant Walmart, Inc.:

4 **TINA M. TABACCHI, ESQ.**

5 **TARA A. FUMERTON, ESQ.**

6 **JOHN M. MAJORAS, ESQ.**

Jones Day

77 West Wacker

Suite 3500

Chicago, Illinois 60601

312-782-3939

7 ttabacchi@jonesday.com

8 tfumerton@jonesday.com

9 jmajoras@jonesday.com

10

11

12

13

14

15

16

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19

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1 AFTERNOON SESSION, THURSDAY, SEPTEMBER 24, 2020

2 (Proceedings commenced at 2:55 p.m.)

3 - - -

14:56:26

4 THE CLERK: Okay. Who do I have for
5 plaintiff?

6 I have no one for plaintiff?

7 MR. BADALA: Hi. This is Salvatore Badala for
8 Cuyahoga County.

9 THE CLERK: Who do I have for Walgreens?

14:56:49

10 MR. STOFFELMAYR: Hi. Kaspar Stoffelmayer.
11 Just joined.

12 MS. MILLER: Sasha Miller for CVS.

13 MR. BUSH: Eric Delinsky and Sasha Miller will
14 be, too, I'm sure.

15 MR. DELINSKY: Yep. This is Eric. I'm on as
16 well.

17 THE CLERK: Okay. So I heard Eric.

18 And was that Graeme Bush?

19 MR. BUSH: Right. Thank you.

14:57:11

20 MS. MILLER: Sasha Miller, too.

21 THE CLERK: Very good.

22 Okay. How about for Giant Eagle, who do I have there?

23 MR. LIVINGSTON: Scott --

14:57:25

24 MR. BARNES: Robert Barnes and
25 Scott Livingston.

1 THE CLERK: I heard Robert Barnes and
2 Scott Livingston.

3 How about for Discount Drug Mart?

4 (No response.)

5 THE CLERK: How about Rite Aid?

6 MS. MOORE: Kelly Moore for Rite Aid.

7 MR. LAVELLE: John Lavelle for Rite Aid.

8 MR. FOUTS: Greg Fouts for Rite Aid.

9 THE CLERK: Very good.

10 Who do I have for Walmart?

11 MS. TABACCHI: Tina Tabacchi. Tara Fumerton
12 and John Majoras are also on.

13 THE CLERK: Did I hear John Majoras and Tara
14 Fumerton?

15 MR. MAJORAS: Yes.

16 MS. FUMERTON: Hi. Yes.

17 Sorry, John.

18 MR. MIGLIORI: Don Migliori is on for Summit
19 County.

20 MR. SHKOLNIK: And Hunter Shkolnik for
21 Cuyahoga. Good afternoon.

22 THE CLERK: Hi.

23 Okay. So for Cuyahoga I have Hunter and Salvatore
24 Badala.

25 Do I have Frank Gallucci?

1 MS. SINGER: And Linda Singer is on for Summit
2 as well. Good afternoon.

3 THE CLERK: Okay. For Summit I hear
4 Linda Singer and Don Migliori.

5 Do I have Pete Weinberger on here?

6 MR. WEINBERGER: Yes, Helen. I'm on. Thank
7 you.

8 THE CLERK: Very good.

9 How about Steve Skikos?

10 Oh, there's a bunch of you.

11 SPECIAL MASTER COHEN: Hi, Helen. It's David.

12 THE CLERK: All right. Perfect.

13 David, is Judge Ruiz going to be on this line?

14 SPECIAL MASTER COHEN: I don't --

15 MAGISTRATE JUDGE RUIZ: Yes, Helen, I'm on.

16 THE CLERK: Okay. Very good. Okay.

17 MR. RAFFERTY: Troy Rafferty is on.

18 MR. KOBRIN: Josh Kobrin for Giant Eagle.

19 MR. RICE: Joe Rice is on.

20 THE CLERK: Is Tim Johnson on yet for Drug
21 Mart?

22 MR. JOHNSON: I am.

23 THE CLERK: Very good.

24 I'm just going to look for a couple of people and then
25 I think we're ready to go, because I know we have

1 representatives for all the defendants.

2 Is Troy Rafferty on?

3 MR. RAFFERTY: Yes, I'm on.

4 THE CLERK? How about Mark Lanier?

5 MR. WEINBERGER: Mark is tied up in another
6 hearing. He may try to join if the hearing -- if the other
7 hearing ends.

8 THE CLERK: Okay. Paul Hanley or Paul
9 Farrell?

10 MR. HANLEY: Hanley is on.

11 THE CLERK: Okay. That's good.

12 That's pretty much all the plaintiffs on this list.

13 So I'm going to talk to Judge Polster. I don't think
14 I'm going to be doing a roll call. I'm just going to let
15 him know who is here, and we'll be with you shortly.

15:00:33

16 Thank you.

17 THE COURT: All right. Good afternoon. I
18 hope everyone is staying safe.

19 All right. I received the status report, so, as I
20 understand it, while the plaintiff waived jury, the
21 defendant will not.

15:02:03

22 Oh, I just want to make sure we have a court reporter;
23 is that correct?

24 THE REPORTER: Yes, Your Honor. I'm on.

15:02:21

25 I'm having a little hard time hearing you compared to

1 the last hearing.

2 THE COURT: Well, I'm now in my office. All
3 right?

4 This is obviously a status call in the Opioid MDL
15:02:28 5 1:17-md-2804 with the lawyers for the plaintiffs and the
6 pharmacies who -- so we're discussing the trial that's now
7 scheduled in November and the following.

8 And I think there's someone on the phone who is not
9 muted, so everyone please mute unless you're speaking.

15:02:57 10 While the plaintiffs will waive jury; the defendants
11 will not. So the November trial will be in front of the
12 jury.

13 The parties believe that in the event the plaintiffs
14 prevail, the abatement phase, which will be to the Court,
15:03:16 15 will take approximately two weeks, and the parties are
16 working on determining how to supplement it.

17 Our Court began jury trials this week. So Judge Gwin
18 had a short trial. He was able to do it successfully. A
19 couple of other judges will be having trials later this
15:03:48 20 month and in October.

21 Our Court is meeting on Monday, October the 5th, to
22 determine what we're going to do in November and December.
23 We will make a collective decision, and then I anticipate
24 that all judges will abide by it. I certainly will, and
15:04:08 25 that will dictate whether or not we'll be able to keep with

1 the schedule for November 9th. But at this point that trial
2 is on.

3 The last time I checked, roughly -- we had sent -- the
4 jury department had sent inquires to about a thousand
15:04:30 5 people, prospective jurors, to ask whether they were willing
6 and able to serve for a four- to five-week trial in
7 November.

8 The last time I checked, roughly 600 of the 1,000 had
9 responded, and about 150 had said they were able to do so.

15:04:52 10 So if we go forward, I'm confident we'll have -- we'll
11 have jurors -- to pick jurors in the venire, and we'll be
12 able to find 12 jurors who can be fair and impartial.

13 Toward that end, I will be sending to the clerk's
14 office later this week the case specific jury questionnaire
15:05:22 15 the Court fashioned with the parties. We've added in all
16 the witnesses.

17 I was dismayed to see that that witness list is over
18 200 people. Obviously, everyone knows we can't have even
19 have a small fraction of 200 people in a four-week trial,
15:05:39 20 but -- I mean, so be it. They'll go through those names.

21 If the trial is going forward, that questionnaire will
22 be sent out the afternoon of October 5th and October 6th.
23 We can stay on schedule.

24 And then we have another status conference the
15:06:08 25 afternoon of October 5th, so I can report to everyone

1 whether the trial is going forward.

2 The status report reflects, of course, that mediation
3 with Judge Gandhi is ongoing.

4 Is anything of significance happening?

15:06:32 5 Are you making any progress is all I want to know.

6 MS. TABACCHI: Your Honor, this is

7 Tina Tabacchi from Jones Day.

8 Judge Gandhi has asked all the parties to the
9 mediation to sign a confidentiality agreement, which really
15:06:47 10 precludes any characterization of the mediation on the
11 record.

12 THE COURT: Well, I don't want to know any
13 details. I want to know, are you having -- are you having
14 serious discussions? All right. Because there need to be
15:07:05 15 serious discussions, and if Judge Gandhi is not able to
16 facilitate them, you need to do something else.

17 I just -- everyone knows what serious discussion is.
18 I mean, if -- at the last -- at the last status conference,
19 the plaintiffs basically said that nothing was happening and
15:07:24 20 they were prepared to just end them.

21 I gather they haven't ended or else that would be in
22 the report.

23 MS. TABACCHI: Your Honor, I can report that
24 the pharmacy defendants have had numerous discussions with
15:07:39 25 Judge Gandhi and with representatives of the plaintiffs

1 since our last status hearing.

2 THE COURT: All right.

3 MS. TABACCHI: The discussions are ongoing.

4 THE COURT: All right. Well, that's fine.

15:07:48 5 That's all I need to know, that they are ongoing and active.
6 All right? That's fine.

7 All right. And that's all I needed to know, but it
8 was my obligation to at least learn that.

9 And then there are some matters that I'm still working
15:08:09 10 on. I issued an order earlier this week on the motion for
11 reconsideration, so that's taken care of.

12 There are a couple of other pending motions that we're
13 dealing with. I'm expecting replies on the motions *in*
14 *limine*.

15:08:30 15 There's an objection to Special Master Cohen's
16 Discovery Ruling 23 that I'm...

17 So is there anything else that I've overlooked or that
18 anyone wants to bring up?

19 MR. WEINBERGER: Your Honor, this is -- this
15:09:00 20 is Pete Weinberger for the plaintiffs.

21 On page 6 of the status report, we've raised a couple
22 of issues, not that they have to be dealt with today, but I
23 wanted to -- the plaintiffs wanted to make sure that the
24 Court knew that those were issues that were on the agenda,
15:09:24 25 and I'm assuming that we can deal with many of these issues

1 with Special Master Cohen. And to the extent that we need
2 assistance of the Court, we will seek that assistance.

3 The fact that the Court raised the issue of the number
4 of witnesses that are on the appendix to the jury
15:09:53 5 questionnaire leads me to this issue:

6 The plaintiffs have identified approximately 50
7 witnesses, and that as we've indicated to Special Master
8 Cohen, we intend to prune that down, you know, as we -- as
9 we approach trial.

15:10:18 10 With respect to the defendants' witnesses, which
11 number about 200 among the six defendants, there
12 are -- there are a number of witnesses that were not
13 previously disclosed in any discovery, which we will deal
14 with through Special Master Cohen.

15:10:43 15 But one of the categories of witnesses that the
16 defendants have disclosed are approximately 12 physicians in
17 the Northern District of Ohio whose names have not
18 previously appeared in any discovery. They are -- there's
19 some orthopedic surgeons. There are some pain management
15:11:14 20 doctors. There are -- there's an anesthesiologist and a
21 pain management. There's a family doctor. Among
22 those -- there's a hematologist, oncologist -- among the --
23 among the physicians who they've named. And we intend to
24 file a motion to strike those witnesses to prevent them from
15:11:44 25 testifying on the basis that they were never previously

1 disclosed.

2 So I wanted the Court to be --

3 THE COURT: I mean, obviously, the defendants
4 are going to have to have a very good justification for
15:11:54 5 coming up with new witnesses on the eve of trial. Maybe
6 they have it, maybe they don't.

7 So the defendants need to understand they're going to
8 have to have a very compelling reason why 12 doctors have
9 just materialized now on the eve of trial.

15:12:12 10 And obviously, the plaintiff -- the defendants are
11 going to have to make those doctors available for deposition
12 if I allow you -- if I allow you to call them, put them on
13 the witness list. And if they're not willing to be deposed,
14 they're off. That's the rule. So I'll wait and see what
15:12:30 15 happens with that.

16 Also not going to spend a lot of my time or Special
17 Master Cohen's time dealing with complaints about
18 authenticity. All right? You all work that out.

19 ARCOS data, documents produced (indiscernible), again,
15:12:52 20 you know, if there's a real question about authenticity,
21 fine. But most of those documents would be.

22 So I have very limited time and I'm not -- I'm going
23 to cut through a lot of objections quickly if the parties
24 don't themselves.

15:13:10 25 But, again, I don't know why -- 200 witnesses, in my

1 opinion, is ridiculous. You each only have a relatively
2 small number of hours. There couldn't be anywhere close to
3 200 witnesses, defense witnesses, that will get anywhere
4 near the witness stand, but ...

15:13:34 5 MR. STOFFELMAYR: Judge, it's Kaspar
6 Stoffelmayr.

7 I don't know if you were looking for a response to any
8 of those comments. You know, we certainly understand and
9 hear your views.

15:13:44 10 I don't think there's a ripe issue. I think there
11 will be a very small number of authenticity issues, if any,
12 that are in front of the Court, true authenticity issues.
13 There may be other admissibility questions that are more
14 difficult, but I don't think authenticity is one of them
15:14:06 15 except in the very unusual case.

16 And I think everyone knows that the witness lists are
17 going to have to get a lot shorter. You know, plaintiffs
18 have 52 people on their witness list. We know that the real
19 number is something like 10 or 15. Their number will drop
15:14:22 20 as will ours. But that's something that's going to happen
21 between now and -- you know, now and the start of trial, I'm
22 sure.

23 THE COURT: All right. Well, this means the
24 prospective jurors have to go through 200 names, and quite
15:14:39 25 frankly, they may get glazed over, so -- but they've got all

1 those names.

2 All right. Well, then I guess we'll be confirmed
3 again on October the 5th in the afternoon, and I'll address
4 the things that are on my plate, the pending motions, by
15:15:06 5 then. Whether I'll resolve the motions *in limine* by then, I
6 don't know. Maybe some of them. Some I can deal with, some
7 may have to wait until trial. It depends on
8 what (indiscernible) understands that.

9 THE REPORTER: It depends on what, Your Honor?

15:15:27 10 THE COURT: On what happens at trial.

11 So there may be some I can't resolve as a practical
12 issue.

13 All right. Stay safe, everyone.

14 Those who celebrated New Year, Happy New Year, and
15:15:44 15 we'll convene again on October the 5th.

16 Thank you.

17 MR. WEINBERGER: Your Honor, this is Peter --

18 THE COURT: People are signing off.

19 Go ahead, Pete.

15:15:54 20 MR. WEINBERGER: You have before you --

21 they're not motions, but both sides submitted preliminary
22 statements to the jury for your review. We couldn't arrive
23 at an agreed preliminary statement, so I'm assuming that's
24 on your agenda.

15:16:14 25 THE COURT: Peter, I haven't even looked at

1 it. How you couldn't even agree on a preliminary statement,
2 that's pretty pathetic. Maybe I'll get it -- maybe I'll
3 figure it out at trial. I'm -- you know, I'm not worried
4 about that. I'm pretty dismayed that the parties couldn't
15:16:31 5 even agree on that. Couldn't agree on jury instructions,
6 I'm doing that myself.

7 So it will get done when it gets done. When you'll
8 see it, maybe the morning of trial. But, obviously, I'm
9 going to instruct the jury something. I don't really care
15:16:51 10 if the parties don't agree. You know what? I'll give them
11 the -- I'll give them the statement that I'll give them.

12 So if they don't agree on it, I'll tell them what I
13 want to tell them. If you don't like it, you can object.
14 Either way.

15:17:08 15 But I haven't given it a minute thought, candidly,
16 Pete.

17 All right. Anything else anyone wants to bring up?

18 MR. WEINBERGER: Well, Your Honor, this is
19 Pete again.

15:17:21 20 I fully expected your reaction to that, and I can just
21 tell you that, you know, we worked hard to reach an
22 agreement. But the reason that I raised the preliminary
23 statement is that this agreement revolves around the
24 fundamental question of to what extent these pharmacy
15:17:51 25 defendants are able to talk about and point fingers at the

1 claims that -- at the other defendants who
2 are -- whose -- who are not going to be in this trial, some
3 of whom settled, and its relevance to a particular case, and
4 certainly, what the focus of this case will be.

15:18:18 5 And that's where the fundamental disagreement is. You
6 know, it's our -- you know, our statement and it's our
7 belief that this case revolves primarily around the conduct
8 of these defendants and whether or not they created a public
9 nuisance or substantially contributed to it.

15:18:36 10 Whereas, the defendants believe that --

11 THE CLERK: Hang on, everybody. Judge Polster
12 got disconnected. I'm just reconnecting him. Give me just
13 a moment, please.

14 MR. WEINBERGER: Okay.

15:19:05 15 THE COURT: All right. I got disconnected.

16 But Pete was saying something and I got disconnected.

17 MR. WEINBERGER: Right.

18 So I'll sort of start from the beginning.

19 The reason that I raised the question about the
15:19:18 20 preliminary statements is that it -- they certainly make
21 clear that we have two divergent views on what this trial is
22 going to be about.

23 The plaintiffs believe the case is about the conduct
24 of the pharmacy defendants and whether or not they
15:19:39 25 substantially contributed to create the public nuisance.

1 Whereas, the defendants clearly want to focus on the
2 conduct of non- -- of nondefendants, some of whom settled,
3 some of whom didn't so, and believe that the focus of the
4 case should, to a large extent, be on the conduct of either
15:20:03 5 defendants who previously settled, defendants who didn't
6 settle, or non- -- nondefendants.

7 And so that's why I raise the issue of your view of
8 the preliminary -- at least the preliminary statement to the
9 jury. So that's why I raised it, Your Honor.

15:20:25 10 MR. STOFFELMAYR: And, Judge, it's
11 Kaspar Stoffelmayr.

12 I don't think this is the time or the place to sort of
13 argue a motion *in limine* that -- I'm not sure if it's been
14 filed. I don't think so. You know, the Court will
15:20:40 15 obviously look at the preliminary statements and do what it
16 thinks is right.

17 But I guess it's sort of stating the obvious that
18 plaintiffs are free to focus on whatever they want to. But
19 it's not up to plaintiff to tell defendants what they must
15:20:55 20 focus on.

21 And, obviously, one of the important questions at this
22 trial is going to be what did cause the opioid crisis, and I
23 don't think there's any view in the world where that's not a
24 relevant question.

15:21:11 25 THE COURT: All right. I was going to say

1 pretty much that. Each side has a certain number of hours.

2 The plaintiffs' burden is to show that one or more
3 defendants caused the public nuisance. Defendants can
4 defend however they want.

15:21:31 5 If the defendants want to spend their limited hours
6 showing that if there was a public nuisance caused by
7 others, they can do that. If they simply want to say, Hey,
8 we didn't do anything wrong and they can -- they've got the
9 out.

15:21:50 10 I'm not going to be -- my neutral statement is not
11 going to talk about others. All right? I'll just say what
12 the plaintiffs have to prove. All right?

13 Okay. You know, they've got to prove that one or more
14 defendants caused a public nuisance. And I'll probably tell
15:22:10 15 the jury something about what a public nuisance is. I'm not
16 going to try anyone's case in the preliminary statement to
17 jurors.

18 But, again, the defendants can defend however they
19 want within the rules, of course.

15:22:28 20 All right. Was there anything else?

21 MR. WEINBERGER: Not from the plaintiffs'
22 perspective.

23 Thank you, Judge.

24 THE COURT: Okay. From the defendants?

15:22:39 25 MR. STOFFELMAYR: No.

1 It's Kaspar.

2 No. Thank you, Judge.

3 THE COURT: All right. Thank you.

4 Stay safe, everyone.

15:22:49

5 - - -

6 (Proceedings adjourned at 3:22 p.m.)

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C E R T I F I C A T E

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11

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

12

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14

/s/ Donnalee Cotone 25th of September, 2020

DONNALEE COTONE, RMR, CRR, CRC

DATE

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Realtime Systems Administrator

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